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IN THE

Supreme Court of the United States

October Term, 1968.

No. 205.

MURCHISON AND COMPANY, a Delaware Corporation, and SUNRAY DX OIL COMPANY, a Delaware Corporation,
Petitioners,

v.

GLO CO., an Illinois Corporation.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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Supreme Court of the United States

OCTOBER TERM, 1968.

No. 205.

MURCHISON AND COMPANY, A DELAWARE CORPORATION, AND SUNRAY DX OIL COMPANY, A DELAWARE CORPORATION,

Petitioners

v.

GLO CO., AN ILLINOIS CORPORATION.

REPLY BRIEF FOR PETITIONERS.

INTRODUCTION.

Respondent's brief (RB) in opposition to the Petition for a Writ of Certiorari (Pet.) requires a brief reply. Respondent attempts to justify the opinion of the Court of Appeals[1] and thus to argue its case on the merits. We

1. Since the filing of the Petition for a Writ of Certiorari in this case, both the opinion of the Court of Appeals dated December 20, 1967, reversing the dismissal by the District Court and the majority and dissenting opinions of the Court of Appeals on rehearing dated March 20, 1968, reversing the dismissal by the District Court, have been reported as *Glo Co. v. Murchison and Company, et al.*, 397 F. 2d 928 (3d Cir. 1968).

respectfully submit that certiorari should be granted because the opinion below is in serious conflict with controlling decisions and because it adversely affects the administration of justice.

Respondent's brief only emphasizes the need for review since its contentions highlight the unfortunate import of the precedent created by the opinion below.

REPLY ARGUMENT TO RESPONDENT'S BRIEF.

A. Precedent Established by the Court of Appeals.

The main point of respondent's brief is that the opinion of the Court of Appeals should stand since it holds that the District Courts lack the power to dismiss, *sua sponte*,[2] if a request for trial is made by plaintiff at a hearing on a rule to show cause regardless of the history of the case (RB p. 8).

We do not understand how respondent reads such a holding into the opinion which articulates no standard, but states only that it is "reluctantly" reversing "in view of the unusual nature of the circumstances" (Appendix B, p. A-5; 397 F. 2d at 929). The very fact that this opinion opens the door to such bizarre interpretations makes it a dangerous precedent throughout the federal system.

Judge Van Dusen's dissent in the Court of Appeals is a clear and concise statement of the history of this case which highlights the plaintiff's delay and the series of warnings by the District Court to the plaintiff. Only one fact is necessary to repeat here.

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2. This Court has already foreclosed the argument of Respondent that suggests that defendant must make a motion to dismiss under Rule 41(b), F. R. C. P. *Link v. Wabash Railroad Co.*, 370 U. S. 626, 8 L. Ed. 734, 82 S. Ct. 1386 (1962).

On June 3, 1966, the District Court, *sua sponte*, issued the second rule to show cause why the case should not be dismissed (Pet., p. 4). Subsequently, at the June 27 hearing on the rule, respondent, with the prospect of dismissal imminent, asked for the first time that a trial date be set (RB p. 6). If such an offer of trial is sufficient to preclude dismissal as a matter of law, a party could always prevent the application of the rule and avoid a dismissal for failure to prosecute. Such a rule is contrary to the plain intent of Fed. R. Civ. P. 41(b) and the local court rules governing dismissal for failure to prosecute, all of which were specifically approved by this Court in *Link v. Wabash, supra.*

B. Misleading Factual Statement.

There is a misleading statement of fact in respondent's brief. Respondent points out that the answer of one petitioner, Sunray DX Oil Company (hereinafter "Sunray"), had admitted owing some amount to respondent (RB p. 5). Respondent makes this statement to this Court in the face of the undisputed fact that Sunray *paid* to respondent the small and isolated amount admitted to be owing and Sunray agreed to pay all similar amounts accruing in the future. The District Court Judge himself removed this as a valid issue; he did not permit the dismissal to become final until payment was made.[3]

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3. This matter is fully documented in the record in the Court of Appeals. See *e.g.* Appellant's Appendix, pp. 98a-100a; Appellee's Appendix, 51b-54b; Appellee's Petition for Rehearing, pages 3-6.

CONCLUSION.

For the reasons stated above, as well as those stated in the Petition for Certiorari, petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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Dated: October 25, 1968